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NORTHERN DISTRICT OF OHIO  
TOLEDO

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IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

\*\*\*\*\*

Sarah White

Plaintiff,

v.

J. Kenneth Blackwell and the Board of  
Elections of Lucas County, Ohio

Defendants.

3:04CV7689  
Cts. No. JUDGE DAVID A. KATZ  
: MOTION FOR TEMPORARY ORDER  
: AND PRELIMINARY INJUNCTION

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Plaintiff moves under Rule 65 of the Federal Rules of Civil Procedure for a temporary order and preliminary injunction, granting temporarily and preliminarily the relief sought in the complaint. This motion is supported by the accompanying memorandum and declaration.

Respectfully submitted,



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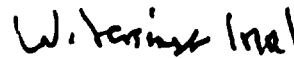
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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

\*\*\*\*\*

Sarah White : Case No.

Plaintiff : **PLAINTIFF'S MEMORANDUM OF**

vs. : **LAW IN SUPPORT OF MOTION FOR**

J. Kenneth Blackwell and the Board of : **TRO AND PRELIMINARY**

Elections of Lucas County, Ohio : **INJUNCTION**

Defendants :

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I. **INTRODUCTION**

The Federal Help American Vote Act ("HAVA") 42 U.S.C. §15482 was signed into law on October 29, 2002, following the controversial 2000 election, during which many people were turned away from the polls. HAVA now requires states to provide a provisional ballot – that is, a contingency ballot that enables a registered voter who is not listed on the voter rolls for one reason or another – to cast a ballot for federal candidates. The recent opinion (Oct. 30, 2004) of

the Secretary of State of Ohio contravenes the letter and purpose of HAVA and would operate to deprive *concededly* eligible voters from exercising their right to vote in the November 2, 2004, election.

Plaintiff Sarah White is a U.S. citizen and eligible voter. Pursuant to Ohio law, Ms. White requested an absentee ballot from the Lucas County Board of Elections, but to date has never received it. Under the Secretary's recent opinion, Ms. White's local Board of Election is forbidden from providing her with a provisional ballot, thereby foreclosing her from voting. Ms. White is threatened with irreparable injury by the Secretary's policy that contravenes the letter and spirit of HAVA. Many like her, who, through no fault of their own did not receive an absentee ballot, will be barred from exercising their right to vote. Plaintiff has no adequate remedy at law since her right to vote at this election, if not safeguarded now, can never be restored, and the election results may be irreversibly affected by the Secretary's erroneous position.

## **II. FACTUAL BACKGROUND**

### **A. PLAINTIFF: AN ELIGIBLE VOTER WHO REQUESTED, BUT DID NOT RECEIVE HER ABSENTEE BALLOT.**

Ohio law provides that eligible voters<sup>1</sup> may cast their votes in the presidential election by absentee ballot, and the Elections Code sets forth the various deadlines for submitting a request for absentee ballot, the information that must be furnished in support of the request, and signature and contact information for the voter. *See* Ohio Rev. Code § 3511.02.

Plaintiff Sarah White is a registered voter of Lucas County, Ohio. (Declaration of Sarah White ["White Decl."], ¶¶2, 4) Ms. White requested an absentee ballot on approximately

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<sup>1</sup> *See* Ohio Rev. Code §§3509.01, 3509.02, 3509.03; 3509.08; 3511.01.

October 1 by completing an Absentee Ballot Application and mailing it to the Board of Elections of Lucas County as prescribed by Ohio law. (White Decl., ¶ 5.) To date, however, Ms. White has never received her absentee ballot. (White Decl., ¶ 14.) Ms. White would like to fully exercise her right to vote by casting a ballot in the November 2004 election. (White Decl., ¶ 8.) She is willing to state under penalty of perjury pursuant to 28 U.S.C. § 15482 that she is (A) a registered voter in the jurisdiction in which the individual desires to vote; and (B) eligible to vote in the 2004 election. (White Decl., ¶ 4.)

**B. THE OHIO SECRETARY'S OCTOBER 30, 2004 OPINION DENYING PROVISIONAL BALLOTS TO VOTERS WHO DID NOT RECEIVE ABSENTEE BALLOTS.**

On October 30, 2004, John A. Borell, Sr., Assistant Lucas County Prosecuting Attorney, Supervisor, Civil Division requested that the Defendant Secretary of State provide clarification of the applicability of HAVA on the question of whether voters, who requested, but did not receive their absentee ballots, would be permitted to cast provisional ballots in the upcoming election:

The Lucas County Board of Elections has received many inquiries from registered voters who have applied for absentee ballots, the Board has mailed the ballot to the voter, but the ballot has not been received by the voter. These voters have requested that they be given a replacement absentee ballot or that they be allowed to vote by provisional ballot. The Board requests written instructions from the Secretary of State as to the proper procedures to follow. Specifically, under the circumstances described above, (1) can the voter be given a "replacement" absentee ballot and, if not, (2) must the Board comply with the provisional voting requirements of HAVA, 42 USC 15482(a), thereby allowing the voter to cast a provisional ballot.

(Exh. 1). The same day, the Secretary of State, through its HAVA attorney, Keith A. Scott, issued an opinion stating that otherwise eligible voters who had requested, but not received their absentee ballots, would not be permitted to cast a provisional vote:

This matter concerns the prospective voter who submits a valid application for an absentee ballot and the Board of Elections mails the same to said prospective voter, yet the ballot is allegedly never received. *Because HAVA is silent on the issue of providing provisional ballots to prospective voters simply because they claim they never received an absentee ballot, Boards of Elections should not provide a provisional ballot at the polling place* so as to avoid facilitating potentially fraudulent acts by creating a situation where someone might vote twice (once when they cast the provisional ballot and once when they cast the absentee ballot that they previously and falsely claimed to have not received).

*Id.* The effect of the Secretary's opinion is to forbid local Boards of Election from providing Ms. White and those like her with provisional ballots, thereby preventing her from voting in the 2004 election.

### **III. PRELIMINARY INJUNCTION STANDARDS.**

“When ruling on a motion for a preliminary injunction, a district court must consider and balance four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.” *Chabad Of Southern Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 431 (6<sup>th</sup> Cir. 2004), *quoting Blue Cross & Blue Shield Mut. of Ohio v. Columbia/HCA Healthcare Corp.*, 110 F.3d 318, 322 (6<sup>th</sup> Cir.1997).

#### **A. THE STATUTE: HAVA (42 U.S.C. § 15482).**

In the 2000 presidential election, thousands of voters in every state were unfairly turned away from the polls without having cast a ballot because poll workers could not find their names on the official list of eligible voters for a particular polling place or precinct. The National Commission on Election Reform, chaired by former Presidents Gerald Ford and Jimmy Carter, found that in the 2000 election, administrative errors effectively disenfranchised thousands of

eligible registered voters across the country. (See National Commission on Election Reform, To Assure Pride and Confidence in the Electoral Process, at 34 (2001) (“NCER Report”) (available at [http://www.reformelections.org/data/reports/99\\_full\\_report.pdf](http://www.reformelections.org/data/reports/99_full_report.pdf)) (visited October 26, 2004). Often, these rejected voters were eligible and properly registered to vote. In some cases, eligible voters’ names were not on the precinct register because the voters recently moved. In other cases, names were missing due to election officials’ failures to maintain accurate voter rolls or to inform registrants of their correct polling-place locations.

The administrative problems in the 2000 election had a disproportionate impact on voters who were members of racial minority groups, and on low-income voters. (See General Accounting Office, Elections: Statistical Analysis of Factors That Affected Uncounted Votes in the 2000 Presidential Election, at 3 (2001) (“[C]ounties with higher percentages of minority residents tended to have higher percentages of uncounted presidential votes, while counties with higher percentages of younger and more educated residents tended to have lower percentages of uncounted presidential votes.”) (available at <http://www.gao.gov/new.items/d02122.pdf>) (visited October 26, 2004); see also House Committee on Government Reform, Minority Staff, Special Investigations Division, Income and Racial Disparities in the Undercount in the 2000 Presidential Election, at 8 (July 9, 2001) (percentage of uncounted votes in 20 congressional districts with low-income/high minority populations were higher, regardless of the type of voting equipment used, than in congressional districts with high-income/low minority populations) (available at [www.house.gov/roybal-allard/undercountreport.pdf](http://www.house.gov/roybal-allard/undercountreport.pdf)) (visited October 26, 2004).

To prevent future disenfranchisement of eligible voters and to revive confidence in the voting system after widespread criticism of the administration of the 2000 presidential election,

Congress enacted HAVA on October 29, 2002. Pub. L. 107-252, 116 Stat. 1666, 42 U.S.C. § 15301 *et seq.* HAVA contains a number of provisions to ensure voting and election administration systems will “be the most convenient, accessible, and easy to use for voters” and will “be nondiscriminatory and afford each registered and eligible voter an equal opportunity to vote and to have that vote counted.” 42 U.S.C. §§ 15381(a)(1), (3). Among these are provisions to mandate provisional balloting.

To prevent future disenfranchisement, the Ford-Carter Commission recommended that every State should permit “provisional voting” by any voter who claims to be qualified to vote in that State. (NCER Report at 35 (“we are motivated by a consistent goal: No American qualified to vote anywhere in her or his state should be turned away from a polling place in that state”).) A provisional ballot is “a ‘fail safe’ method that can be used when a potential voter’s registration status is challenged at the precinct.” Caltech/MIT Voting Technology Project, *Voting: What Is, What Could Be* at 29-30 (2001) (estimating that 1.5 million rejected votes of eligible voters could have been saved in 2000 presidential election by use of provisional ballots) (available at [www.vote.caltech.edu/Reports/july01\\_VTP\\_%20Voting\\_Report\\_Entire.pdf](http://www.vote.caltech.edu/Reports/july01_VTP_%20Voting_Report_Entire.pdf)) (visited October 26, 2004).

Specifically, provisional voting allows a voter whose information does not appear on a polling place’s list of registered voters to cast a special ballot that will be segregated from the regular ballots and will be counted later, after election officials verify the voter’s eligibility. Ordinarily, the voter places his or her provisional ballot in an envelope bearing his/her signature and information about the circumstances of the provisional vote. After the election, officials use the information on the outside of the provisional ballot envelope to research the voter’s



eligibility. If election officials verify that the voter was eligible to vote, the envelope is opened, and the election officials count the votes the voter cast for the offices for which he was qualified to vote. If the election officials determine that the voter was not eligible to vote in the election, the envelope remains sealed, and the ballot goes uncounted.

HAVA adopted the Ford-Carter Commission's recommendation that a provisional balloting system be adopted nationwide. Congress specifically found that provisional balloting was needed to guarantee that eligible voters would not be disenfranchised in future elections as they were in the 2000 election:

Hundreds, maybe thousands of voters were improperly turned away from the polls in the last election, their votes effectively robbed through a careless bureaucracy at best, and mal-intent at worst. We may never know for sure, but we do know that we need provisional voting to prevent this travesty from ever occurring again.

147 Cong. Rec. H9254-02, H9260 (daily ed. Dec. 12, 2001) (statement of Rep. Menendez); *see also* 148 Cong. Rec. H7836-04, H7837 (daily ed. Oct. 10, 2002) (statement of Rep. Ney) ("When this legislation goes into effect, the voting citizens of this country will have the right to a provisional ballot, so no voter will be turned away from a polling place, no voter will be disenfranchised, just because their name does not appear on a registration list."); 148 Cong. Rec. S709-03, S711 (daily ed. Feb. 13, 2002) (statement of Sen. Dodd) ("By passing this bipartisan election reform bill, the Senate will help ensure that every single eligible American has the equal opportunity to both cast a vote and, of course, to have their vote counted.").

HAVA mandates that states count provisional ballots if “the individual is eligible under State law to vote.” 28 U.S.C. § 15482.2 (a)(4). The only requirement to be an “elector” under Ohio law is that the individual be a U.S. citizen aged 18 or older who has been (i) a resident of Ohio 30 days immediately preceding the election; (ii) a resident of the county and precinct in which she offers to vote, and (iii) has been registered to vote for 30 days. O.R.C. §3503.01.

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2 The statute (42 U.S.C. § 15482) provides in relevant part:

(a) Provisional voting requirements

If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows:

- (1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.
  - (2) The individual ***shall be permitted to cast a provisional ballot*** at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is--
    - (A) a registered voter in the jurisdiction in which the individual desire to vote; and
    - (B) eligible to vote in that election.
  - (3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).
  - (4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law.
- (Emphasis added.)

**B. ENFORCEMENT UNDER SECTION 1983.**

HAVA creates a private right of action as it is a federal right that may be enforced against state officials under 42 U.S.C. § 1983. *Florida Democratic Party v. Hood*, 2004 WL 2414419, \*3 (N.D. Fla., Oct. 21, 2004), *citing* *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003); *Gonzaga University v. Doe*, 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002); *Blessing v. Freestone*, 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997); *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). The relevant section of HAVA “clearly evinces a congressional intention to create a federal right.” *Florida Democratic Party* at \*4.

HAVA speaks directly of individual voters, not just of actions required of elections officials, and HAVA even refers explicitly to the “right” of voters to cast a provisional ballot. See 42 U.S.C. § 15482(b)(2)(E). There is nothing precatory about the statute; Congress clearly imposed a mandate. And the mandate is one that is readily subject to judicial interpretation and enforcement, much like the many other rights that are the subject of litigation in federal courts every day. Finally, although HAVA has other enforcement mechanisms, they are not inconsistent in any respect with the availability of relief under § 1983.

*Id.* “Congress sought to protect the right to vote by adopting the provisional voting section of HAVA.” *Id.*

**C. PLAINTIFF’S STANDING.**

Standing generally depends upon whether the party has alleged such a personal stake in the outcome of the controversy, as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.” *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972). Plaintiff, a voter who is directly impacted by the Secretary’s misinterpretation of HAVA and will be deprived of her right to vote

on November 2, 2004 as a direct consequence of the ruling, clearly has a personal stake in the matter sufficient to confer standing on her to bring this claim.

D. MERITS: VOTERS' ENTITLEMENT TO A PROVISIONAL BALLOT.

The purpose of HAVA's provisional ballot provisions is "to ensure that every eligible American who goes to vote gets to vote and that every vote cast counts." 148 Cong. Rec. S709-03, S726 (daily ed. Feb. 13, 2002) (statement of Sen. Schumer). HAVA requires each state to permit an individual whose name does not appear on the "official list of eligible voters for the polling place" or whom a state official claims is not eligible to vote for any reason "to cast a provisional ballot at the polling place upon the execution of a written affirmation" that the individual is a "registered voter in the jurisdiction" and is "eligible to vote in that election." 42 U.S.C. § 15482(a)(2).

Here, the Secretary's October 30, 2004 policy pronouncement contravenes the letter and spirit of HAVA. The Secretary's position begins with the express assumption that a prospective voter had "submitted a *valid* application for an absentee ballot and the Board of Elections mails the same to said prospective voter, yet the ballot is allegedly never received." (Exh. 1) In other words, the Secretary candidly acknowledges that the voter who will be turned away on Election day has otherwise met all of the requirements for *voting eligibility* (e.g. age, citizenship, residency); *and* has made out a sufficient showing under Ohio law (and in the correct form) to warrant a vote by absentee ballot. The Secretary defies HAVA's mandate by relying on the statute's "silen[ce] on the issue of providing provisional ballots to prospective voters simply because they claim they never received an absentee ballot." (Exh. 1.)

Secretary Blackwell's effort to circumvent HAVA must not be countenanced. First, the Ohio Secretary of State does not have the authority to overrule the plain language of a statute. *Accord, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, fn. 9, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (“[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. [citations omitted] If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”); *Charvat v. Dispatch Consumer Serv.*, 95 Ohio St. 3d 505, 508, 769 N.E.2d 829 (2002) (holding that court must follow agency commentary unless it is at odds with regulation it explains); *but see, Christensen v. Harris Co.*, 529 U.S. 576, 587, 120 S.Ct. 1655 (2000) (holding that statutory interpretation contained in opinion letter that was not the result of formal adjudication or notice-and-comment rulemaking “does not warrant Chevron style deference.”). The Secretary is thus not vested with the power to deprive Ohio voters of rights conferred upon them by a federal statute.

Second, the Secretary's construction flies in the face of the plain language of HAVA. “Settled rules of statutory construction are applied in interpreting legislation relating to elections. Such statutes should be liberally construed, especially in favor of citizens whose right to vote they tend to restrict.” *See State, Ex Rel. Spencer v. Bd. of Elections*, 102 Ohio App. 51, 56-57, 141 N.E.2d 195 (1956) *quoting* 18 Am.Jur. 188, § 11. HAVA mandates that individuals **shall** be permitted to cast a provisional ballot at that polling place upon affirming two and only two facts: first, that the individual is “a registered voter in the jurisdiction in which the individual desires to vote;” and second, that she is “eligible to vote in that election.” HAVA

does not have a *third* requirement, as the Secretary's ruling seems to suggest, that the voter *also* prove the whereabouts of her absentee ballot and/or that she did not previously vote.

In a similar case interpreting HAVA, the district court for the Northern District of Florida flatly rejected the Secretary of State's contention that a person can be denied the right to cast a provisional ballot by a unilateral decision of an election worker. *Democratic Party of Florida* at \*7. The court reasoned that errors are to be expected during the voting process as election workers "make mistakes," and the voting rolls are "not infallible." *Id.* "That is why provisional balloting exists." *Id.* HAVA thus anticipates such mistakes by allowing an otherwise eligible voter to cast a provisional ballot "by making the required declaration and executing the required affirmation . . . ." *Id.* The danger of fraud is mitigated because "the ballot will *count* only if the person was indeed 'eligible under State law to vote' in this election at this polling place." *Id.*

Here, plaintiff, did not receive her absentee ballot due to the mistake of an election worker. (White Decl., ¶ \*\*.) She has declared under penalty of perjury that she is a registered voter in Lucas County, where she desires to vote, and that she is eligible to vote in this election. HAVA requires no more of her and requires that she be permitted to cast a provisional vote. HAVA, by its terms, undermines the Secretary's argument that allowing her to vote would lead to fraud because her vote would *count* only if she were, in fact, eligible under [Ohio] law to vote."

E. REMAINING PREREQUISITES TO TRO/PRELIMINARY INJUNCTION.

The remaining elements of a preliminary injunction are easily met here. "A person who is denied the right to vote suffers irreparable injury. One need look no further than the 2000 election to confirm that it is so." *Democratic Party of Florida, supra*, \*7. The Secretary's order

denying provisional ballots to eligible voters who did not receive their absentee ballots would cause irreparable harm to many Ohio citizens, because denial of the right to vote would deprive them of a fundamental constitutional right. *Reynolds v. Sims*, 377 U.S. at 562 (right to vote is fundamental constitutional right); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (denial of right to vote constitutes irreparable harm). Plaintiff, and those like her, are directly subject to this threatened harm, because it is now certain that their local election boards will refuse to even furnish them with a provisional ballot. The disenfranchisement of these voters constitutes truly irreparable harm.

Defendant, on the other hand, can point to nothing suggesting that the state will suffer the slightest injury if Plaintiff and those like her are allowed to cast provisional ballots. The Secretary's concern of mass voting fraud is pure conjecture (compared to the very real penalty of disenfranchisement that will result if the provisional ballot requirements are ignored as the Secretary urges), and any risk of double-counting will be mitigated, if not wholly eliminated by the HAVA's requirement that an appropriate state official determine whether the person casting a provisional ballot is "eligible under State law to vote" before counting the ballot. 42 U.S.C. § 15482(a)(4).

Finally, the public interest favors issuance of such an injunction. "It is in the public interest that each voter's right to vote be protected against administrative errors. That is why HAVA created a right to cast a provisional ballot." *Id.* "[I]t is in the public interest to allow a voter to cast a provisional ballot, so that if it ultimately is determined that the voter was indeed entitled to vote as he or she asserted, the vote will count, and the right to vote will not be lost." *Id.*

**IV. CONCLUSION.**

Under the Secretary's interpretation of HAVA, Plaintiff, and those similarly situated, will not be permitted to cast a provisional vote in the 2004 election. Plaintiff, and those like her, are threatened with irreparable injury by the Defendants' actions, since many eligible voters will be barred from exercising their right to vote. Plaintiff has no adequate remedy at law since her right to vote at this election, if not safeguarded now, can never be restored, and the election results may be irreversibly affected by the Defendants' practices.

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